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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1277

ROBERT V. RAFTER,

Petitioner,

v.

FLOYD BLACKMON and KOIZIM & DAVIDOFF,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Petition for Writ of Certiorari timely?

2. Does the decision of the Supreme Court in *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 92 S. Ct. 1113, rehearing denied 92 S. Ct. 1611 (1972) so change the law of this case that a new hearing is warranted?

STATEMENT

The statement set forth in petitioner's brief Page 3 and in Judge Zampano's decision cited in petitioner's brief Page A12, 13 sufficiently state the facts except for one material point.

Petitioner in his statement of facts on Page 3 states that, "Judge Zampano dismissed the complaint". This is incorrect, in fact, Judge Zampano granted Respondents Motion for Summary Judgment. (Petitioner's brief A18)

ARGUMENT

I. IS THE PETITION FOR WRIT OF CERTIORARI TIMELY?

On April 27, 1967 Respondents Motion for Summary Judgment was granted by the Honorable Robert C. Zampano (Petitioner's brief A18). Petitioner appealed from the granting of the Motion for Summary Judgment to the United States Court of Appeals for the Second Circuit. The case was argued and decided on November 9, 1967 and the judgment of the district court for Connecticut was affirmed.

A writ of certiorari intending to bring any judgment or decree in any civil action before the Supreme Court for review must be taken or applied for within 90 days after the

entry of said judgment or decree. This 90 day period may be extended by a Justice of the Supreme Court for a period not exceeding 60 additional days. 28 U.S.C. Sec. 2101 (C). No petition or writ of certiorari was brought by the petitioner within either 90 days or an additional 60 days after judgment of the United States Court of Appeals.

Petitioner attempts to circumvent this rule by means of making a Motion for Recall, which Motion was made on November 29, 1972 to the United States Court of Appeals pursuant to Rule 27(B) (Petitioner's Brief A4-7). This Motion was denied by the United States Court of Appeals on December 19, 1972. (Petitioner's Brief A1).

It is from the denial of this Motion that Petitioner seeks a writ of certiorari.

Petitioner's Motion under Rule 27(B) for recall was and is an inappropriate way to seek a further hearing on this case. Rule 27(B) as cited by the Petitioner is a subsection of Rule 27 of the Federal Rules of Appellate Procedure. It provides that motions addressed to a previous decision or order of the court or for the stay, recall or modification of any mandate or decision of the court . . . shall be referred by the clerk to the Judges who heard the appeal, normally without oral argument. (Petitioner's Brief A20). As a subsection of Rule 27, the Rule relied upon by Petitioner deals only with motions and not with judgments. A writ of certiorari is available only when sought from a judgment or decree, 28 U.S.C. Sec. 2101(c).

The only procedure available to the Petitioner after the decision of the United States Court of Appeals upholding the Summary Judgment was: (a) to within the framework of 28 U.S.C. Sec. 2101(C) seek a writ of certiorari, or, (b) within 14 days after the Summary Judgment was upheld by the

Court of Appeals to file a petition for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure.

Failing to do either, the petitioner's writ of certiorari is untimely. *Bird* v. *U.S.*, (CA Mass. 1957) 241 F.2d 516.

The purpose of statutes limiting the period of appeal is to set a definite point of time when litigation shall be at an end unless within that time, the prescribed application has been made and if it has not, to advise prospective appellees that they are freed from the appellant's demands. *Matton Steamboat Co.* v. *Murphy,* (NY 1943) 319 U.S. 412, 63 S. Ct. 1126.

More than five years has elapsed since petitioner lost his appeal to the United States Court of Appeals. Respondent, therefore, is entitled to the termination once and finally of this action.

II. DOES THE DECISION OF THE SUPREME COURT IN *LYNCH* v. *HOUSEHOLD FINANCE CORPORATION* SO CHANGE THE LAW OF THIS CASE THAT A NEW HEARING IS WARRANTED?

The judgment of the United States Supreme Court in *Lynch* v. *Household Finance Corporation,* 405 U.S. 538, 92 S. Ct. 1113, rehearing denied 92 S. Ct. 1611 (1972) simply was that the Federal courts did have jurisdiction of the subject matter and remanded the case to the District Court of Connecticut for further proceedings.

The District Court of Connecticut heard the case on remand, Judges Anderson, Timbers and Zampano presiding, and on January 12, 1973 filed their decision, which decision is presently unpublished, a copy of which is found in this brief at A1. The district court on remand found Connecticut's garnishment statute unconstitutional and held, "we hold that

Section 52-329 of the General Statutes of the State of Connecticut is unconstitutional and *"enjoin the defendant from taking any continuing or further action based upon the provisions of said statute"* (Emphasis added). The decision of the District Court appears to be prospective in nature as seen in the quoted language and would appear to have no retroactive application. We have ascertained that there is no appeal pending from this decision, which decision bears docket no. 13-737 and that the time for appeal being 30 days pursuant to Federal Rules of Appellant Procedure 4 (A), has passed.

Even if the court were to determine that this decision were to be retroactively applied and that the garnishment statute of the State of Connecticut was invalid at the time the events complained of by the petitioner occurred, this would not appear to in any way modify the prior decisions of the District Court and the Court of Appeals. In essence, the lower courts have held that in this case, no wrong was committed against the petitioner either under State or Federal law. (See Petitioner's Brief Appendix A14-17). Since no wrong was committed against the petitioner, it would appear that the retroactive application of the *Lynch* decision would have no substantive bearing on the lower courts decision.

A writ of certiorari lies within the sound discretion of the court. *Hyde* v. *Shine*, (Cal. 1905) 199 U.S. 62, 25 S. Ct. 760.

The ruling on a Motion for a new trial (which is analogous to petitioner's motions for recall) is discretionary and not reviewable in the federal courts. *Ward* v. *Joslin*, (NH 1902) 186 U.S. 142, 22 S. Ct. 807.

The Supreme Court though it stands ready to correct violations of Constitutional Rights, requires that the burden of showing essential unfairness be sustained by him who claims such injustice and that such burden be sustained not

as a matter of speculation but as demonstrable reality. *Beck* v. *Washington,* (Wash. 1962) 369 U.S. 541, 82 S. Ct. 955, rehearing denied 370 U.S. 965, 82 S. Ct. 1575. See also *Higgins* v. *Carr Bros. Co.,* (Me. 1943) 317 U.S. 522, 63 S. Ct. 337.

CONCLUSION

The Petitioner having failed to seek his writ of certiorari within the time provided and the petition itself not setting forth facts showng "essential unfairness", this respondent prays that petitioner's writ of certiorari be denied.

Respectfully submitted,

JEFFREY M. MINES
Counsel for Respondent
FLOYD BLACKMON

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIVIL ACTION No. 13,737

DOROTHY LYNCH, on behalf of herself and all other persons similarly situated,

Plaintiff,

v.

HOUSEHOLD FINANCE CORPORATION, et al.,

Defendants.

BEFORE: ANDERSON, TIMBERS, *Circuit Judges,* and ZAMPANO, *District Judge*

MEMORANDUM OF DECISION FINDINGS OF FACT and CONCLUSIONS OF LAW

ANDERSON, *Circuit Judge:*

This class action challenges, on due process grounds, the constitutionality of the Connecticut pre-judgment foreign attachment or garnishment statute, Conn. Gen. St. § 52-329.[1] Jurisdiction is based upon 42 U.S.C. § 1983, 28 U.S.C. § 1343, and a three-judge District Court has been convened pursuant to 28 U.S.C. § § 2281, 2284.[2]

There is no factual dispute. The plaintiff, Dorothy Lynch, represents a class of persons, natural or otherwise, who are subject to Connecticut in personam jurisdiction and who have debts owing to them currently being garnished prior to judgment pursuant to § 52-329. The defendant, Household Finance Corporation, represents a class of persons who have garnished debts owing to the plaintiff class pursuant to § 52-329.[3]

Garnishment under the present Connecticut statutory scheme is simple. In bringing any action for money damages, the plaintiff need only insert in the writ a direction to the sheriff or constable to serve a copy of it upon any person indebted to the defendant or holding his goods. Once this is done, the goods or debt is secured in the garnishee's hands for payment of any judgment which the plaintiff might recover.

All of this takes place solely on the authority of the plaintiff's attorney as a Commissioner of the Superior Court, and without any prior notice to the defendant and without affording the defendant an opportunity to be heard. Furthermore, a garnishment may be released by the court only if it is excessive or if a bond is substituted, see, *e.g.*, *Harris* v. *Barone*, 147 Conn. 233, 158 A.2d 855 (1960); *Clime* v. *Gregor*, 145 Conn. 74, 138 A.2d 794 (1958).[4]

The due process clause of the Fourteenth Amendment incorporates a flexible concept into our Constitution, but at its core, it requires an opportunity for a hearing after due notice before a person is deprived of any significant property interest, except in very unusual situations.

The central requirements of due process have always been the giving of effective notice and the opportunity to be heard, see, *e.g.*, *Schroeder* v. *City of New York*, 371 U.S. 208, 212 (1962); *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950); *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914); *Baldwin* v. *Hale*, 68 U.S. 223, 233 (1863). If there was ever any doubt, it is now settled that the opportunity to be notified and heard must be granted *prior* to the garnishment of the property, *Board of Regents* v. *Roth*, 408 U.S. 564, 569-70 (1972); *Fuentes* v. *Shevin*, 407 U.S. 67, 80-82 (1972); *Bell* v. *Burson*, 402 U.S. 535, 542 (1971); *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

When garnishment is instituted, the property taken is the *use* of one's funds or goods during the duration of the garnishment, see, *Sniadach, supra,* at 342 (Harlan, J., concurring). There is no doubt that this property interest is entitled to Fourteenth Amendment protection, even though the loss may be only temporary and a bond could be substituted, *Fuentes, supra,* at 85; *Bell, supra, at* 536. Moreover, due process is not limited to cases where basic necessities are taken; it is also required whenever there is a seizure of any significant property interest, *Fuentes, supra,* at 88-89.

There are unusual situations which permit a taking of property without a prior hearing, but these occasions have been limited to those in which there was an important public interest to be served, where there was a special need for prompt action, or where the seizure was initiated by a government official acting under a narrowly drawn statute, *Fuentes, supra,* at 90-92 (and cases cited therein).[5] The Connecticut statute in question, however, permits a private party to constrain or withhold from another that other's use of his own property for the purely personal interest of the private party making the garnishment, without any showing of the necessity for prompt action.

In holding the Connecticut garnishment statute unconstitutional for failure to provide a prior hearing, this court makes no attempt to delineate or describe the kind of notice that must be given or the type of hearing that must be held. That task rests in the hands of the legislature, see, *Fuentes, supra,* at 96-97; *Bell, supra,* at 542-43; *Goldberg* v. *Kelly,* 397 U.S. 254, 267 (1970). The Supreme Court has, however, indicated some factors which need to be considered.

The hearing that is required depends upon the circumstances, including the importance of the interests to be taken and the nature of the subsequent proceedings, *Roth, supra,* at 570, n. 8; *Boddie, supra,* at 378. It is not necessary that the

plaintiff fully establish his claim at the hearing, but he must at least show the probable validity of it, *Bell, supra,* at 540; *Sniadach, supra, at* 343 (Harlan, *J.*, concurring). What due process mandates is that there be a hearing "granted at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965), in order "to prevent unfair and mistaken deprivations of property," *Fuentes, supra,* at 97.

We hold that § *52-329* of the General Statutes of the State of Connecticut is unconstitutional and enjoin the defendants from taking any continuing or further action based upon the provisions of said statute.

Judgment may be entered in favor of the plaintiff with her costs.

Dated at New Haven, Connecticut, this 12th day of January, A.D. 1973.

ROBERT P. ANDERSON
United States Circuit Judge

WILLIAM N. TIMBERS
United States Circuit Judge

ROBERT C. ZAMPANO
United States District Judge

FOOTNOTES

[1]Conn. Gen. St. § 52-329 reads as follows:

> "When the effects of the defendant in any civil action in which a judgment or decree for the payment of money may be rendered are concealed in the hands of his agent or trustee so that they cannot be found or attached, or when a debt is due from any person to such defendant, or when any debt, legacy or distributive share is or may become due to such defendant from the estate of any deceased person or insolvent debtor, the plaintiff may insert in his writ a direction to the officer to

leave a true and attested copy thereof and of the accompanying complaint, at least twelve days in the case of the superior court or the court of common pleas, or six days in the case of the circuit court, before the session of the court to which it is returnable, with such agent, trustee or debtor of the defendant, or, as the case may be, with the executor, administrator or trustee of such estate, or at the usual place of abode of such garnishee; and from the time of leaving such copy all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and any debt, legacy or distributive share, due or that may become due to him from such executor, administrator or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover."

[2]This action was originally dismissed for lack of jurisdiction, *Lynch* v. *Household Finance Corp.*, 318 F. Supp. 1111 (D. Conn. 1970), but it is now before us on a remand from the Supreme Court, *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972).

[3]This is a proper class action under F. R. Civ. P. 23 (b) (2), because an injunction and a declaratory judgment were the only relief sought. Notice to members of the classes was neither given nor required in this case, *Hansberry* v. *Lee*, 311 U.S. 32, 41-43 (1940); see also, *Yaffe* v. *Powers*, 454 F.2d 1362, 1366 (1 Cir. 1972); *Wilczynski* v. *Harder*, 323 F. Supp. 509, 512, n. 3 (D. Conn. 1971); *Solman* v. *Shapiro*, 300 F. Supp. 409, 411, n. 1 (D. Conn.) *aff'd* 396 U.S. 5 (1969); Comment of the Advisory Committee, 39 F.R.D. 69, 106-107 (1966); 3B J. Moore, Federal Practice ¶ 23.55, at 23-1152-53, ¶ 23.72, at 23-1421-22 (2d ed. 1969). The interests of the absent parties were fairly insured because there are no money damages, there is no factual issue to be resolved, counsel for the named parties adequately represent the interests of the classes, the Commercial Law League is a participant as an amicus curiae for the defendants, and the legal constitutional issue is not complex in light of recent Supreme Court decisions. Although it is suggested that dictum in *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 564-65 (2 Cir. 1968), requires notice in all class actions, see Moore, *supra*, we read *Eisen* simply to say that notice is required in all class actions when due process so requires.

Furthermore, notice of the proceedings was given to The Governor and the Attorney General of Connecticut pursuant to 28 U.S.C. § 2284.

[4]For a more detailed description of the garnishment process, see *Lynch* v. *Household Finance Corp.* 405 U.S. 538, 552-555 (1972). Note also the description of the Massachusetts prejudgment attachment procedures, very similar to Connecticut's, held unconstitutional in *Schneider* v. *Margossian*, Civil No. 72-1421-G (D. Mass., filed Sept. 22, 1972).

[5]It may well be that garnishment necessary to secure jurisdiction in the state courts is an exception justifying the postponement of notice and hearing, *Fuentes*, *supra*, at 91, n. 23; *Ownbey* v. *Morgan*, 256 U.S. 94 (1921). Furthermore, an ex parte hearing might be sufficient if a creditor could show that there was an immediate danger that a debtor was going to conceal or abscond with his assets, *cf.*, *Fuentes*, *supra*, *at* 93.

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Rule 40. Petition for Rehearing.

(a) TIME FOR FILING; CONTENT; ANSWER; ACTION BY COURT IF GRANTED. A petition *for rehearing* may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case.

Rule 4. Appeal as of Right — When Taken

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal re-

quired by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.